SERVED: April 15, 1994

NTSB Order No. EA-4124

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of March, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. JEFFREY W. BENNETT, Respondent.	Docket SE-12268

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on September 10, 1992, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator, having found that respondent violated 14 C.F.R. 91.111 and 91.123(b).[2] The law

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]§ 91.111(a) provides:

judge, however, finding mitigating circumstances, reduced the proposed suspension of respondent's airline transport pilot certificate from 45 to 30 days. We deny the appeal.

Respondent was the flying pilot-in-command of a Cessna Citation that departed Centennial Airport, Denver, CO, on January 18, 1991. His first officer was primarily manning the radio.[3] According to the ATC transcript, respondent's aircraft was cleared to depart runway 17L and to fly the runway heading. After respondent was airborne (Tr. at 34), ATC queried whether the Citation saw a Cessna[4] ahead and upwind to the right. Exhibit C-1 at 0135:34. The Citation responded affirmatively. ATC then said:

> Thank you after he turns crosswind south of him you can start a right turn and proceed direct to Denver V O R contact Denver departure have a nice flight.

Exhibit C-1 tower transcript, at 0135:40. According to the transcript, the Citation immediately responded with its call

(..continued)

> No person may operate an aircraft so close to another aircraft so as to create a collision hazard.

§ 91.123(b) provides:

> (b) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. . . .

[3]Respondent testified to having made one unrelated transmission to ATC. Tr. at 61. The first officer made all the transmissions discussed here.

[4]A single-engine Cessna 172.

sign. Id. at 0135:46.

There is no disagreement that the Cessna 172 and the Citation were in close visual contact, but the parties disagree as to the proximity of the aircraft. The local/ground controller testified to 150-200 feet vertical separation, being unable to judge horizontal separation from his distance approximately 1/2 to 2 miles away. Tr. at 15, 19. Mr. and Mrs. O'Malley, the pilots in the Cessna 172, estimated 100-150 feet vertical separation and no horizontal separation. Exhibits C-3 and 4. Respondent's February 27, 1991 letter to the FAA (Exhibit C-2) indicates that he passed approximately 300 feet above the Cessna 172. At the hearing, however, he testified that the Citation was in a 25-degree bank, and he flew an arc around the Cessna, climbing during the whole turn; at one point in that turn the two aircraft were within 300 feet. Tr. at 73-74. Respondent argues that there was no collision hazard.

Respondent further testified that he did not remember hearing either the 0135:34 or :40 communication from ATC, advising of the Cessna 172 and directing a turn behind it. After he heard these transmissions on the tower tape, he had his radio checked, and was advised that the pilot's audio panel had intermittent reception "causing degradation of the received audio signal." Exhibit R-3 (letter from Kings Avionics, dated August 15, 1991).

According to respondent, he and his first officer independently observed two aircraft. Although respondent did not

mention the existence of two other aircraft in his letter of explanation to the FAA (Exhibit C-2), at the hearing he testified that one aircraft appeared to be arriving for a landing on runway 35R (the opposite end of 17L, parallel and next to 17R), and coming head on. Respondent testified that he started a right turn (towards the Denver VOR), as directed by his first officer, at which point they passed a second aircraft they had earlier seen on their right. Respondent testified that he was more concerned with the oncoming aircraft, and did not think anything of his passing of the second, the Cessna 172. Tr. at 68.

The law judge found, as a matter of fact, that the two aircraft passed with no horizontal and 200 feet vertical separation, consistent with the testimony of the ATC witness and the O'Malleys. The law judge accepted respondent's testimony that he was in a right hand turn and climbing, as consistent with the O'Malley testimony. The law judge also found respondent credible in his statement that he did not hear the two relevant instructions from ATC, and that he could rely on his first officer's statement that they were cleared for a right-hand turn. The law judge concluded that these facts should mitigate the sanction but the violations should not be dismissed because respondent had a continuing duty to see and avoid other traffic.

Respondent appeals on two grounds. First, he argues that the law judge erred in considering the statements (Exhibits C-3 and C-4) of Mr. and Mrs. O'Malley, who did not appear at the hearing, having refused to honor the subpoena issued by the

Administrator. He argues that his being denied the opportunity to contront or cross-examine the witnesses was reversible error. (He does not argue that hearsay evidence is or should be ;per se inadmissible in Board proceedings.) Second, he claims that, given the law judge's findings that respondent did not hear the critical instructions and that he reasonably relied on his first officer's advice that they had been cleared for a right-hand turn direct to the Denver VOR, the law judge was obligated to dismiss the complaint rather than merely mitigate the sanction.

As to the first argument, we find no merit in respondent's contention that he was improperly denied the right to confront or cross-examine the O'Malleys and that it was therefore improper for the law judge to rely on their unsworn testimony.

Respondent was not denied the opportunity to confront the O'Malleys face to face, whether in the hearing or beforehand. There is no indication or argument that respondent was unaware of their existence or their opinions regarding the incident. Respondent need not depend and has no right to depend on the Administrator to produce witnesses respondent believes should appear at trial. Respondent had the full opportunity to subpoena these individuals and to ask the law judge to enforce any such subpoena, or to depose them prior to the hearing. Respondent did none of these things. Moreover, as the law judge noted, the key documents (reports to the FAA) are official and public records, with the issue being not their admissibility but the weight they should be given when their authors do not testify. Clearly, the

situation here is far different from the anonymous allegations cited in Administrator v. Peretti, NTSB Order EA-3647 (1992). Indeed, many aspects of the O'Malleys' reports were confirmed by or consistent with testimony at the hearing by the ATC witness and respondent himself.

Respondent's second argument -- that having found respondent reasonably relied on his first officer, the charge of operating contrary to an ATC instruction must be dismissed -- overstates the law judge's holding.[5] While the law judge found that respondent should have been able to rely on his first officer's report that they had been cleared for a right-hand turn, he also found that respondent continued to have a "see and avoid" obligation. Because respondent was admittedly aware of the proximity of the O'Malley aircraft, respondent abrogated his command responsibility when he chose to rely on a crew statement that he should have challenged. Thus, respondent's reliance was not reasonable to the extent precedent requires.[6] We find no

[5]In Administrator v. Fay & Takacs, NTSB Order EA-3501 (1992) at 9, we summarized the reasonable reliance defense:

> If . . . a particular task is the responsibility of another, if the PIC has no independent obligation (e.g., based on operating procedure or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found.

[6]Administrator v. Fay & Takacs, supra. Recall that respondent was aware of the Cessna 172 to the right in front of him. The duty of care to which he is held requires that he question an instruction to make a right-hand turn that puts him unusually close to another aircraft. (Standard airspace separation is 500 feet. See Tr. at 47.) To execute the turn "on reliance" put respondent's aircraft no more than 300 feet

error in this assessment.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 30-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.[7]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

(..continued)
vertically from the Cessna 172, by respondent's own admission (and within 150 feet vertically and no horizontal separation according to the O'Malleys' report). These distances make the reliance unreasonable, and, as we read the record below, the law judge did not accord any weight to respondent's testimony about turning to avoid a third aircraft.

[7]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).